RECORD AND BRIEFS

No. 15-513

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,
EX REL. CORI RIGSBY; KERRI RIGSBY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The False Claims Act ("FCA") in 31 U.S.C. § 3730(b)(2) directs relators to file a *qui tam* complaint under seal and serve it, with an evidentiary disclosure, only on the government, and courts to maintain the seal for 60 days. Respondents properly filed and served their complaint, but their former attorney emailed their evidentiary disclosures to three people before the seal expired. The courts below found that Respondents were blameless, and that the disclosures did not publicly disclose the lawsuit, harm the government's ability to investigate, or frustrate the purposes of the FCA seal provision in any way. The first question presented is:

Whether a court may allow an FCA *qui tam* action to proceed, despite a post-filing disclosure in violation of the seal, where the relator did not know or approve of the disclosure, and the disclosure did not harm the government's ability to investigate the relator's claims or otherwise frustrate the purposes of the FCA seal provision in any way.

2. The FCA in 31 U.S.C. § 3729(a)(1) imposes liability upon "any person who—(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;" or "(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." Congress defined "knowingly" broadly in § 3729(b)(1) to include "acts in deliberate ignorance of

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

the truth" and "acts in reckless disregard of the truth." The Fifth Circuit below found (at 38a) that Petitioner's supervisor, "acting in reckless disregard of the truth or falsity of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used." The second question presented is:

Whether a company can be held liable under the FCA based on the reckless acts of a supervisor that caused the company to present false claims and use false records, even though an allegedly unaware subordinate submitted the false claims and records.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

I. The National Flood Insurance Program ... 1

II. The Rigsbys' Complaint and State Farm's Motions to Dismiss Based on Rule 9(b) and the FCA Seal Provision 2

III. The Rigsbys Prove State Farm's Scheme to Defraud the Government in a Bellwether Trial 6

IV. The Fifth Circuit's Decision 9

REASONS FOR DENYING THE PETITION 11

I. The Fifth Circuit's Congressional-Purpose-Driven Approach to Determine Whether an Alleged Seal Violation Justifies Dismissal Under 31 U.S.C. § 3730(b)(2) Does Not Warrant Review 11

A. The Second, Fourth, Fifth, and Ninth Circuits Apply the Same Test to Determine Whether Alleged Seal Violations Warrant Dismissal 11

B. The Sixth Circuit's Articulation of an Outlier Automatic Dismissal Rule Does Not Warrant Review 16

TABLE OF CONTENTS – Continued

Page

C. The Difference Between the Predominant Congressional-Purpose-Driven Approach and the Sixth Circuit's Automatic Dismissal Rule Will Affect Few Cases 18

D. The Fifth Circuit's Application of the FCA Seal Provision Is Faithful to this Court's Precedents and the FCA's Text and Purpose 24

II. The Fifth Circuit's Ruling that the Rigsbys Presented Sufficient Evidence to Prove that State Farm Acted with the Requisite Scienter to Violate the FCA Does Not Warrant Review 30

A. The Fifth Circuit Upheld State Farm's Liability Based on Lecky King's Knowledge, Not the Collective Knowledge Doctrine 31

B. The Fifth Circuit's Imposition of FCA Liability on State Farm Based on Lecky King's Knowledge Implicates No Circuit Split 32

C. The Fifth Circuit's Evidentiary Ruling that Lecky King Possessed the Requisite Knowledge to Hold State Farm Liable Under the FCA Is Well-Founded and Does Not Warrant Review 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

ACLU v. *Holder*, 673 F.3d 245 (4th Cir. 2011) 14

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 25, 26

Burke v. *Westcare Found., Inc.*, No. 11-cv-5078, 2011 U.S. Dist. LEXIS 100668 (N.D. Ill. Sept. 6, 2011) 19

Burns v. *Lavender Hill Herb Farm, Inc.*, No. 01-cv-7019, 2002 WL 31513418 (E.D. Pa. Oct. 30, 2002) 20

California v. *Rooney*, 483 U.S. 307 (1987) 12

Carter v. *G & S Food Shop*, No. 13-14017, 2013 WL 6421833 (E.D. Mich. Oct. 10, 2013) 19

Carter v. *Subway Store # 6319*, No. 11-cv-15158, 2012 WL 666838 (E.D. Mich. Feb. 29, 2012) 19

Castenson v. *City of Harcourt*, 86 F. Supp. 2d 866 (N.D. Iowa 2000) 21

Daggett v. *Neufelder*, No. 11-C-0100, 2011 WL 334531 (E.D. Wis. Feb. 1, 2011) 19

Dolan v. *United States*, 560 U.S. 605 (2010) 24, 25, 26

Erickson ex rel. United States v. *Am. Inst. of Biological Scis.*, 716 F. Supp. 908 (E.D. Va. 1989) 20

Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 35

TABLE OF AUTHORITIES – Continued

Page

Foster v. *Savannah Commc'n*, 140 Fed. App'x 905 (11th Cir. 2005).....18

Friedman v. *F.D.I.C.*, Nos. 96-cv-277, 93-cv-415, 1995 WL 608462 (E.D. La. Oct. 16, 1995).....20

Gonzalez v. *Thaler*, 132 S. Ct. 641 (2012).....26

Grand Union Co. v. *United States*, 696 F.2d 888 (11th Cir. 1983).....34

Gray v. *United States*, No. 11-cv-02024, 2012 WL 4359280 (D. Colo. Mar. 6, 2012).....17

Gray v. *United States*, No. 11-cv-02024-WYD-MEH, 2012 WL 4359280 (D. Colo. Sept. 24, 2012).....21

Hale v. *Nat'l Ctr. for State Courts*, No. 3:97-cv-802, 1998 U.S. Dist. LEXIS 4858 (E.D. Va. Jan. 30, 1998).....20

Hallstrom v. *Tillamook Cnty.*, 493 U.S. 20 (1989).....26, 28, 29

In re Darvocet, No. 12-270-DCR, 2015 WL 2451208 (E.D. Ky. May 21, 2015).....18

In re Natural Gas Royalties Qui Tam Litig., 467 F. Supp. 2d 1117 (D. Wyo. 2006).....21

Lady Deborah's, Inc. v. *VT Griffin Servs., Inc.*, No. 07-cv-079, 2007 WL 4468672 (S.D. Ga. Oct. 26, 2007).....20

Lariviere v. *Lariviere*, No. 11-40065-FDS, 2012 WL 1853833 (D. Mass. May 18, 2012).....19

TABLE OF AUTHORITIES – Continued

Page

Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 25

Mach Mining, LLC v. *E.E.O.C.*, 135 S. Ct. 1645 (2015) 26, 27, 28

McNeil v. *United States*, 508 U.S. 106 (1933) 26, 29

Nasuti v. *Savage Farms, Inc.*, No. 12-30121-GAO, 2014 U.S. Dist. LEXIS 40939 (D. Mass. Mar. 7, 2014) 21

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 18

Russello v. *United States*, 464 U.S. 16 (1983) 25

Segelstrom v. *Citibank, N.A.*, 76 F. Supp. 3d 1 (D.D.C. 2014) 18

Taitz v. *Obama*, 707 F. Supp. 2d 1 (D.D.C. 2010) 19

Tanner v. *United States*, 483 U.S. 107 (1987) 34

United States ex rel. Anderson v. *ITT Indus. Corp.*, No. 05-cv-720, 2006 WL 4117030 (E.D. Va. Jan. 11, 2006) 20

United States ex rel. Bibby v. *Wells Fargo Home Mortg. Inc.*, 76 F. Supp. 3d 1399 (N.D. Ga. 2015) 17, 23

United States ex rel. Branch Consultants, L.L.C. v. *Allstate Ins. Co.*, 668 F. Supp. 2d 780 (E.D. La. 2009) 21

United States ex rel. Danner v. *Quality Health Care Inc.*, No. 11-4026, 2011 WL 4971453 (D. Kan. Oct. 18, 2011) 17

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Davis v. *Prince*, 766 F. Supp. 2d 679 (E.D. Va. 2011) 21, 22

United States ex rel. Downy v. *Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000) 23

United States ex rel. Fellhoelter v. *Valley Milk Prods., L.L.C.*, 617 F. Supp. 2d 723 (E.D. Tenn. 2008) 20

United States ex rel. Gale v. *Omnicare, Inc.*, No. 1:10-cv-127, 2013 WL 2476853 (N.D. Ohio June 7, 2013) 22

United States ex rel. Gunn v. *Shelton*, No. 13-163-RGA, 2013 WL 5980633 (D. Del. Nov. 12, 2013) 19

United States ex rel. Harrison v. *Westinghouse Savanna River Co.*, 352 F.3d 908 (4th Cir. 2003) 32, 34

United States ex rel. King v. *F.E. Moran, Inc.*, No. 00-cv-3877, 2002 WL 2003219 (N.D. Ill. Aug. 29, 2002) 22

United States ex rel. Kurt v. *Lakeshore Spine & Pain, P.C.*, No. 11-cv-1051, 2012 U.S. Dist. LEXIS 125350 (W.D. Mich. Sept. 5, 2012) 22

United States ex rel. Kusner v. *Osteopathic Medical Center of Philadelphia*, No. 88-9753, 1996 WL 287259 (E.D. Pa. May 30, 1996) 23, 24

United States ex rel. Le Blanc v. *ITT Indus.*, 492 F. Supp. 2d 303 (S.D.N.Y. 2007) 20

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Lujan v. *Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995) ..... *passim*

United States ex rel. Mailly v. *Healthsouth Holdings, Inc.*, Nos. 07-cv-2981, 09-cv-483, 2010 WL 149830 (D.N.J. Jan. 15, 2010) 19

United States ex rel. Mikes v. *Straus*, 931 F. Supp. 248 (S.D.N.Y. 1996) 21

United States ex rel. Milam v. *Regents of Univ. of Cal.*, 912 F. Supp. 868 (D. Md. 1995) 21

United States ex rel. Nasuti v. *Savage Farms, Inc.*, No. 12-30121, 2014 WL 1327015 (D. Mass. Mar. 27, 2014) 17

United States ex rel. Pilon v. *Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995) ..... *passim*

United States ex rel. Price v. *McFarland*, No. 04-4058-RDR, 2004 WL 3171649 (D. Kan. Sept. 22, 2004) 20

United States ex rel. Smith v. *Clark/Smoot/ Russell*, 796 F.3d 424 (4th Cir. 2015) ..... *passim*

United States ex rel. Stevens v. *State of Vt. Agency of Natural Res.*, 162 F.3d 195 (2d Cir. 1998), *rev'd*, 529 U.S. 765 (2000) 22

United States ex rel. Stewart v. *Altech Servs., Inc.*, No. CV-07-0213, 2010 WL 4806829 (E.D. Wash. Nov. 18, 2010) 17, 21

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. *Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990), *case dismissed*, 755 F Supp. 1055 (S.D. Ga. 1990) 21

United States ex rel. Summers v. *LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011) 13, 16, 17, 23

United States ex rel. Surdovel v. *Digirad Imaging Solutions*, No. 07-0458, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013) 19

United States ex rel. Tex. Portland Cement Co. v. *McCord*, 233 U.S. 157 (1914) 26, 29

United States ex rel. Ubl v. *IIIF Data Solutions*, No. 06-cv-641, 2009 WL 1254704 (E.D. Va. May 5, 2009) 21, 22

United States ex rel. Windsor v. *DynCorp, Inc.*, 895 F. Supp. 844 (E.D. Va. 1995) 22

United States v. *Fiske*, 968 F. Supp. 1347 (E.D. Ark. 1997) 21

United States v. *Johnston*, 268 U.S. 220 (1925) 35

United States v. *Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) 32, 33, 34, 35

Walker v. *Cmty. Educ. Ctrs.*, No. CV-12-02582, 2013 WL 4774778 (D. Ariz. Sept. 5, 2013) 17, 19

Wisz ex rel. United States v. *C/HCA Dev., Inc.*, 31 F. Supp. 2d 1068 (N.D. Ill. 1998) 21

Youakim v. *Miller*, 425 U.S. 231 (1976) 31

TABLE OF AUTHORITIES – Continued

Page

STATUTES

31 U.S.C. § 3729(a)(1)(A) 34, 36

31 U.S.C. § 3729(a)(1)(B) 34

31 U.S.C. § 3729(b)(1)(A) 30

31 U.S.C. § 3730 ..... 14, 25, 26

31 U.S.C. § 3730(b) 28

31 U.S.C. § 3730(b)(2) ..... *passim*

31 U.S.C. § 3730(e)(1) 26

31 U.S.C. § 3730(e)(2)(A) 26

31 U.S.C. § 3730(e)(3) 26

31 U.S.C. § 3730(e)(4) 21

31 U.S.C. § 3730(e)(4)(a) 26

31 U.S.C. § 3731 26

31 U.S.C. § 3731(b)(1) 26

42 U.S.C. § 2000e-5(f)(1) 27

42 U.S.C. § 6972(b)(1) (1982 ed.) 28

Resource Conservation and Recovery Act of 1976 ..... 28, 29

RULES AND REGULATIONS

44 C.F.R. Pt. 61, App. A 1

44 C.F.R. Pt. 62, App. A, Art. II(C) 2

44 C.F.R. Pt. 62, App. B 2

TABLE OF AUTHORITIES – Continued

Page

44 C.F.R. Pt. 62, App. B(c)(3)(B) 36

44 C.F.R. Pt. 62, App. B(c)(3)(C) 36

44 C.F.R. Pt. 62, App. B(d)(3) 36

Fed. R. Civ. P. 9(b) 2, 18, 21

Sup. Ct. R. 10 35

OTHER AUTHORITIES

S.Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S.C.C.A.N. 5266 14

COUNTERSTATEMENT OF THE CASE

Respondents Cori Rigsby and Kerri Rigsby ("Rigsbys") brought this *qui tam* action against Petitioner State Farm Fire and Casualty Co. ("State Farm") under the False Claims Act ("FCA"). The Rigsbys proved at trial how State Farm abused its participation in the National Flood Insurance Program ("NFIP") to shift losses arising out of Hurricane Katrina onto the federal government. (1a-2a.)

I. The National Flood Insurance Program.

The federal government provides flood insurance through the NFIP to homeowners in areas where private insurance companies typically have declined to issue such coverage. (3a.) The Federal Emergency Management Agency ("FEMA") administers the NFIP through the "Write Your Own" Program, whereby it authorizes private insurance companies (called "WYO insurers") to issue flood policies, collect premiums, adjust flood claims, and pay flood claims with government money. (3a-4a.) The flood policies must conform to FEMA's forms in 44 C.F.R. Pt. 61, App. A, which cover flood damage and exclude wind damage. (3a.)

State Farm and other WYO insurers often also issued, to the same customers, homeowner policies that provided coverage for wind damage, but excluded coverage for flood damage. (4a.) For hurricanes, FEMA authorized WYO insurers to use the same adjuster to determine the federal government's liability for flood damage and the insurer's liability for

wind damage. 44 C.F.R. Pt. 62, App. A, Art. II(C). This gives WYO insurers an inherent financial incentive to classify wind damage as flood damage. (4a.) To address that incentive, FEMA regulations specify that WYO insurers' relationship with the government is "one of a fiduciary nature" and require WYO insurers to submit their files for review at least once every three years. 44 C.F.R. Pt. 62, App. B.

II. The Rigsbys' Complaint and State Farm's Motions to Dismiss Based on Rule 9(b) and the FCA Seal Provision.

The Rigsbys filed their initial complaint under seal on April 26, 2006 and served a copy on the government pursuant to the FCA seal provision, 31 U.S.C. § 3730(b)(2). (21a.) The Rigsbys are former insurance adjusters who were employed by a State Farm contractor to adjust claims for storm damage caused by Hurricane Katrina. (3a.) They alleged how State Farm exploited its status as a WYO insurer to shift its liability for wind damage caused by Hurricane Katrina to the federal government by mischaracterizing wind damage as flood damage. (1a-2a, 4a-7a.)

State Farm moved to dismiss the Rigsbys' claims, arguing (among other grounds) that the Rigsbys failed to satisfy Federal Rule of Civil Procedure 9(b) and violated the FCA seal provision. The district court denied State Farm's motions on these grounds. (10a-11a, 22a-23a, 69a, 77a.) Even though the Rigbys'

allegations extended "far beyond the realm" of the example claims they pled, the district court required the Rigsbys first to prove State Farm's FCA violation in a bellwether trial regarding an example claim involving the home of Thomas and Pamela McIntosh. (5a, 7a, 10a, 14a.)

With respect to the alleged seal violations, the district court rejected 46 of the 49 purported violations that State Farm identified, most of which disclosed only State Farm's fraudulent conduct and not this *qui tam* action. (57a, 61a, 64a-68a.) The district court rejected other purported violations because they occurred after it had partially lifted the seal and permitted this case to be disclosed publicly in another case.[1] (63a, 66a.)

The three violations that the district court found were committed by the Rigsbys' disqualified former attorney, Richard Scruggs ("Scruggs"). (68a.) The district court held that Scruggs violated the seal by sending the Rigsbys' evidentiary disclosures to three

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[1] State Farm wrongly contends that the Fifth Circuit contravened the district court's intent when it "declined to consider seal violations that occurred after January 10, 2007," because the district court never "intended to set aside the seal." Pet. at 11-12 n.9. On the contrary, the district court itself held: "this order could therefore be reasonably interpreted to authorize these judicial disclosures in pleadings and other documents distributed to the litigants and their attorneys. This type of disclosure would effectively make the original seal of the *qui tam* case moot." (63a.) The Fifth Circuit reasonably agreed that "[t]his effectively mooted the original seal." (21a.)

reporters as "background" for stories. (45a-47a, 67a-68a.) It also held that there was "no evidence" that these disclosures "led to a public disclosure in the news media that this action had been filed." *Id.* It further held that "[w]ithout such a public disclosure, these violations of the seal could not have impaired the government's ability to investigate the Relators' allegations." *Id.*

In its Petition, State Farm misstates that "[t]here is no question that relators Cori and Kerri Rigsby and their then-counsel Dickie Scruggs intentionally violated the seal requirement repeatedly and in bad faith." Pet. at 3. The district court held that there was no evidence that the Rigsbys acted in bad faith:

> It is also apparent to me that the Relators' role in making these disclosures was not an active one. While a party is responsible for the actions taken by his attorney, there is nothing in the record to suggest that the disclosures in question . were authorized by or made at the suggestion of the Relators. Absent some evidence that would support the inference that the Relators approved, authorized, or initiated these disclosures I find no basis to conclude that the Relators have acted willfully or in bad faith.

(68a.) When Scruggs made the disclosures at issue, he and affiliated attorneys were acting "as advocates for their [other] clients who had homeowner policy claims." *Id.*

State Farm does not challenge the Fifth Circuit's and district court's rulings (21a, 61a) that the FCA public disclosure provision prohibits only disclosure of the *qui tam* action and permits disclosure of a defendant's wrongdoing. Pet. at i-ii. Yet, State Farm repeatedly misstates that the Rigsbys violated the seal by discussing State Farm's wrongdoing. *See* Pet. at 10 (asserting the Rigsbys violated § 3730(b)(2) by disclosing "*allegations* substantively identical to those in the sealed *qui tam* Complaint") (emphasis added). State Farm argues (at 11) that the Rigsbys violated the seal by providing "sealed *information*" to Congressman Gene Taylor. The district court held that "Congressman Taylor's statement does not make specific reference to this FCA action, and I find no evidence in the Record that Congressman Taylor reached his conclusions based on information that he received from the Relators." (65a.) State Farm similarly misstates (at 10) that the Rigsbys violated the seal during interviews for a *20/20* story. The district court held that "neither this program nor most of the other interviews and statements submitted by State Farm in support of this motion specifically discuss the existence of this FCA suit." (65a.) There is no finding that the Rigsbys – as opposed to Scruggs – made or approved a disclosure in violation of § 3730(b)(2). (68a.)

III. The Rigsbys Prove State Farm's Scheme to Defraud the Government in a Bellwether Trial.

The Rigsbys proved how State Farm's scheme led to the submission of a false record and false claim for the example home of Thomas and Pamela McIntosh. (2a.) Through the testimony of neighbors and experts, the Rigsbys proved how Hurricane Katrina's winds destroyed the McIntosh home before any flood waters arrived. (34a-35a.) The Rigsbys also proved that State Farm "knowingly" submitted a false claim for the McIntosh home.

They proved that Alexis "Lecky" King ("King"), the person in charge of State Farm's adjustment of NFIP flood claims, issued instructions and procedures that produced flood determinations regardless of whether wind or flood actually caused damage to a policyholder's home. (4a-7a, 39a.) King was one of two primary supervisors in the temporary "storm catastrophe office" State Farm established in Gulfport, Mississippi to process NFIP flood claims for Katrina damage. (4a.)

Shortly after Katrina, King convened a meeting to educate State Farm's trainers on how to adjust policyholders' claims. (4a.) She issued the following false instruction:

> What you will see is, you will see water damage. The wind wasn't that strong. You are not going to see a lot of water damage. If

> you see substantial damage, it will be from water.

Id. State Farm's trainers then effectively told State Farm's adjusters to presume flood damage instead of wind damage. (38a.) These instructions caused the adjusters for the McIntosh home to presume that flooding was the primary cause of damage. (5a.)

King and her trainers instructed State Farm adjusters to implement procedures that violated FEMA directive W5054, which governed how WYO insurers were to adjust NFIP flood claims from Katrina. Prior to Katrina, FEMA's policy and State Farm's procedure was to require adjusters to perform a "line-by-line" adjustment of storm damage to determine, item-by-item, which parts of a home were damaged, the value of the damage, and the cause of the damage – flood or wind. (4a-5a.) In the wake of Katrina, FEMA authorized an expedited procedure in W5054 for claims involving a house that: 1) "had standing water in [it] for an extended period of time" or 2) was "washed off its foundation by flood water." (5a.) All other claims fell into a third category that required "normal claims procedures." (5a.) King and another employee thrice asked FEMA to expand the categories for which State Farm could use expedited procedures, and FEMA thrice declined to grant that request. (15a.) FEMA witnesses testified that compliance with W5054 by performing a line-by-line adjustment was a prerequisite to payment of NFIP claims. (36a.)

King and her trainers instructed State Farm's adjusters to use expedited procedures far more broadly than FEMA authorized. (5a, 17a, 38a.) State Farm used a program called Xactotal, which merely estimates the total value of a home based on square footage and build quality, whenever storm damage to a home appeared to exceed the NFIP flood policy's limits. (5a.) They told the adjusters to presume flood damage and manipulate the Xactotal program to "hit the limits" of NFIP flood policies, which reduced any uncompensated loss for which State Farm could be liable under its homeowner policy. (5a, 16a-17a.) Another State Farm employee, Jody Prince, documented that instruction in an email to Lecky King. (38a.)

State Farm's trainers told the adjusters to use the Xactotal program to generate fake line-by-line reports to hide its violations of W5054. (17a, 40a-41a.) The fake reports were so convincing that State Farm's own expert witness Gerald Waytowich – a former FEMA readjuster – could not tell the difference. (40a-41a.) At trial, King testified that she knew and appr ved of State Farm's creation of these records, and although she disputed that the records were false, she conceded that State Farm's use of the records was widespread. (17a.)

King also coerced the engineers whom State Farm hired purportedly to determine whether Katrina damage was caused by wind or flood. (6a.) State Farm retained an engineering firm, Forensic Analysis Engineering Corporation ("Forensic"), to examine the

McIntosh home and determine whether wind or flood was the primary cause of damage. *Id.* Forensic engineer Brian Ford examined the McIntosh home and issued a report ("Ford Report") that identified wind as the primary cause of damage. *Id.*

When King received the Ford Report, she refused to pay Forensic and withheld it from the NFIP file. *Id.* She placed a note on the Ford Report that read "Put in Wind [homeowner's policy] file – DO NOT Pay Bill DO NOT discuss." *Id.* King pressured Forensic to change the Ford Report and other reports at the risk of losing contracts with State Farm, and to fire Brian Ford. 6a, 38a-39a. As a result of King's "strong-arm" tactics, Forensic had another engineer write a report that identified flood as the primary cause of damage to the McIntosh home. *Id.*

After a two week trial, the jury issued a unanimous verdict that State Farm knowingly submitted a false claim and used a false record in violation of the FCA. (117a.)

IV. The Fifth Circuit's Decision.

State Farm appealed the district court's rulings that the alleged seal violations did not warrant dismissal and that there was sufficient evidence for the jury to find that State Farm knowingly submitted a false claim and used a false record. The Fifth Circuit affirmed both rulings.

The Fifth Circuit applied the Ninth Circuit's three-part test from *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 243-244 (9th Cir. 1995), to hold that Scruggs' alleged seal violations did not warrant dismissal of the Rigsbys' *qui tam* claims. (18a-23a.) It held that the alleged violations did not harm the government's investigation or otherwise frustrate the purposes of § 3730(b)(2) because the existence of this case was not disclosed to the general public or State Farm. (22a.) It noted that the Rigsbys complied with the filing and service requirements in § 3730(b)(2), unlike the relators in other cases that resulted in dismissal. *Id.* It also held that "[t]here is no indication that the Rigsbys themselves" violated the seal. *Id.* The Fifth Circuit held that these rulings made it unnecessary to determine whether it could impute Scuggs' disclosures to the Rigsbys under the circumstances of this case.[2] (22a-23a.)

The Fifth Circuit also held that evidence supported the jury's verdict that State Farm violated the FCA by knowingly submitting a false claim and making a false record. (32a-41a.) Contrary to State Farm's mischaracterization (at 32) that "the Fifth Circuit allowed liability based upon unspecified, collective, amorphous 'knowledge' of State Farm employees who were purportedly 'perpetrators' of a generalized scheme," the Fifth Circuit held that King

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[2] This issue provides an alternative ground to affirm the Fifth Circuit's decision.

possessed the requisite knowledge to hold State Farm liable under the FCA:

> Even if we were to agree with State Farm that one individual must have knowledge that a claim is false, the jury could have reasonably believed that King alone, "act[ing] in reckless disregard of the truth or falsity" of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used.

(39a.) The Fifth Circuit denied a petition by State Farm seeking rehearing en banc because no judge requested a poll. (42a-43a.)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Congressional-Purpose-Driven Approach to Determine Whether an Alleged Seal Violation Justifies Dismissal Under 31 U.S.C. § 3730(b)(2) Does Not Warrant Review.

A. The Second, Fourth, Fifth, and Ninth Circuits Apply the Same Test to Determine Whether Alleged Seal Violations Warrant Dismissal.

State Farm seeks review of the Fifth Circuit's application of the FCA seal provision, 31 U.S.C. § 3730(b)(2), based on the false premise that "five different circuits" have issued "three conflicting rules"

regarding when a relator's alleged seal violation will warrant dismissal of a *qui tam* action. Pet. at 15. Specifically, State Farm argues (at 17-19) that the Second and Ninth Circuits applied conflicting rules in *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995), and *Lujan*, 67 F.3d at 245-247, and that the Fourth and Fifth Circuits exacerbated that purported split when the Fourth Circuit adopted *Pilon* in *United States ex rel. Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015) and the Fifth Circuit adopted *Lujan* in this case. (20a-21a.)

In fact, the Second, Fourth, Fifth, and Ninth Circuits apply the same analysis – whether the alleged seal violation frustrated the purposes of the FCA seal provision by impeding the government's ability to investigate the relators' claims and decide whether to intervene before the defendant learns of the case. (19a-21a.); *Pilon*, 60 F.3d at 999; *Smith*, 796 F.3d at 430; *Lujan*, 67 F.3d at 245. State Farm parses minor differences in the language those Circuits used to express the same rule of law, but "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987). State Farm does not identify a circumstance in which those Circuits would reach conflicting results.

As the Fifth Circuit below explained (20a-21a), the Ninth Circuit in *Lujan* identified three factors that courts should evaluate "in determining whether dismissal was warranted: 1) the harm to the government ; 2) the nature of the violations [*i.e.*, initial

filing violations or later disclosures]; and 3) whether the violations were made willfully or in bad faith." (20a-21a); *Lujan*, 67 F.3d at 245-247. These factors merely describe when, as articulated in *Pilon*, 60 F.3d at 996, a relator's seal violation "incurably frustrate[s] the statutory purposes" underlying the seal requirement. *See also Smith*, 796 F.3d at 430.[3]

The Ninth Circuit cited *Pilon* in support of each factor in its three-factor test: 1) that "irreparable harm to the government" "incurably frustrated the statutory purposes underlying the seal requirements;" 2) initial filing violations are more severe than subsequent disclosures; and 3) "district courts must inquire into" "the presence or absence of bad faith." *See Lujan*, 67 F.3d at 245-246 (citing *Pilon*, 60 F.3d at 996-997, 999-1000). The Ninth Circuit also explained how it derived its three-part test from Congress's dual purposes when it enacted § 3730(b)(2) in 1986:

> By providing for the seal provision, Congress intended to strike a balance between the purposes of *qui tam* actions [and] law enforcement needs. The purpose of *qui tam* actions is to encourage more private false

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[3] The Fifth Circuit described the analysis in *Lujan* and *Pilon* as similar (20a), and the concurring judge in *United States ex rel. Summers* v. *LHC Group, Inc.*, noted that the Ninth Circuit in *Lujan* was merely "[t]aking the *Pilon* court's analysis and restating it." 623 F.3d 287, 300 (6th Cir. 2010) (Keith, J., concurring).

> claims litigation. The other side of the balance recognizes the need to allow the Government an adequate opportunity to fully evaluate the private enforcement suit.

See Lujan, 67 F.3d at 245 (discussing text of § 3730 and S.Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-5289) (citations omitted). This purpose-driven analysis is exactly what the Second Circuit prescribed in *Pilon*, 60 F.3d at 996-997.

The only meaningful difference that State Farm asserts between *Lujan* and *Pilon* is that "[i]n contrast to the Ninth Circuit, the Second Circuit made clear that *possible* harm to the Government or to the defendant's reputation is relevant." Pet. at 18.[4] On

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[4] State Farm also argues that the Second and Fourth Circuits disagree with the Fifth and Ninth Circuits regarding whether "protection of a defendant's reputation is a relevant consideration in determining the consequences of a seal violation." Pet. at 18. Any difference is purely academic. The Ninth Circuit held that a district court could consider harm to the defendant's reputation under its inherent powers. *Lujan*, 67 F.3d at 247 n.4. No decision that State Farm cites has turned on this issue. As the Fifth Circuit correctly held below (21a), the FCA seal provision prohibits disclosure only of the existence of a *qui tam* action, not the defendant's fraud. *See also ACLU* v. *Holder*, 673 F.3d 245, 254 (4th Cir. 2011). To justify dismissal, a district court would have to find that the purported harm to a defendant's reputation arose from the disclosure of the lawsuit rather than of the defendant's fraud. Moreover, this case does not implicate this issue, because "none of the disclosures appear to have resulted in the publication of the existence of this suit." (22a.)

the contrary, the Second Circuit required that the purposes of § 3730(b)(2) be "*incurably* frustrated." *Pilon*, 60 F.3d at 998 (emphasis added). The relators in *Pilon* did not file under seal or serve the government. *Id.* The Second Circuit affirmed dismissal because it found actual harm: "The government was not notified that a *qui tam* complaint had been filed, and therefore could not determine whether the complaint might interfere with any ongoing investigation or whether the government should intervene." *Id.* at 999.

State Farm likewise is incorrect when it argues that the Fourth Circuit in *Smith* "declined to follow . . the Ninth Circuit's 'no harm, no foul' balancing test, and adopted the Second Circuit's frustration-of-congressional goals standard." Pet. at 18. The Fourth Circuit equated such frustration with harm to the government:

> Here, the seal violation did not incurably frustrate [Congress's] purposes. Although [the relator's] attorney's breach of the seal requirement tipped off Defendants, the Government was still able to investigate the alleged fraud and determine whether it was already investigating the same issue.

Smith, 796 F.3d at 430. This analysis is indistinguishable substantively from the Ninth Circuit's analysis in *Lujan* of "whether the Government actually suffered any harm." 67 F.3d at 245-246.

B. The Sixth Circuit's Articulation of an Outlier Automatic Dismissal Rule Does Not Warrant Review.

State Farm primarily seeks review based on the Sixth Circuit's outlier reasoning in *United States ex rel. Summers* v. *LHC Group, Inc.* that every violation of the FCA seal provision, even if innocuous, requires dismissal. *See* 623 F.3d 287, 296-297 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011). The relator in *Summers* failed to file his complaint under seal and serve it on the government. *Id.* at 289. *Summers* does not create a genuine conflict because the Sixth Circuit has applied its outlier reasoning only once and only to those facts, and the other Circuits agree that such initial filing violations warrant dismissal of a relator's claims.

Indeed, the Sixth Circuit based much of its decision upon the Second Circuit's dismissal for similar initial filing violations in *Pilon*: "[t]he Pilons' failure to comply with the service and filing requirements incurably frustrated *all* of these [Congress's] interests." *Summers*, 623 F.3d at 293 n.5 (quoting *Pilon*, 60 F.3d at 999). The Ninth Circuit likewise agreed with a holding that "'failure to comply with the filing and service provisions *irreversibly* frustrates the congressional goals underlying those provisions,'" and it cited *Pilon*, 60 F.3d at 997, for the proposition that such errors are more severe than later disclosures. *Lujan*, 67 F.3d at 245-246. The Fourth Circuit in *Smith*, 796 F.3d at 430, expressly adopted the Second Circuit's analysis in *Pilon*, 60

F.3d at 998, and distinguished *Pilon* because the relator's post-filing disclosure was not public.

This Court declined to review the Sixth Circuit's automatic dismissal rule in *Summers*, 131 S. Ct. 3057 (2011). Review is less warranted now. The Sixth Circuit's reasoning, an outlier when *Summers* was decided, has become increasingly marginalized. The Second, Fourth, Fifth, and Ninth Circuits all have rejected an automatic dismissal rule. (20a); *Pilon*, 60 F.3d at 998-1000 and n.5; *Smith*, 796 F.3d at 430; *Lujan*, 67 F.3d at 245. Every district court outside the Sixth Circuit since *Summers* likewise has rejected such a rule. *See United States ex rel. Bibby* v. *Wells Fargo Home Mortg. Inc.*, 76 F. Supp. 3d 1399, 1410 n.14 (N.D. Ga. 2015) (finding "only one other court outside of the Sixth Circuit to arguably adopt a per se rule of dismissal," referencing a pre-*Summers* case, which the court noted "did not truly apply a per se rule of dismissal").[5] The Sixth Circuit has not had the opportunity to reconsider its analysis in light of this overwhelming rejection by the federal judiciary.

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[5] *See also United States ex rel. Nasuti* v. *Savage Farms, Inc.*, No. 12-30121, 2014 WL 1327015, at *15 (D. Mass. Mar. 27, 2014); *Walker* v. *Cmty. Educ. Ctrs.*, No. CV-12-02582, 2013 WL 4774778, at *1-2 (D. Ariz. Sept. 5, 2013); *Gray* v. *United States*, No. 11-cv-02024, 2012 WL 4359280, at *6 (D. Colo. Mar. 6, 2012); *United States ex rel. Danner* v. *Quality Health Care Inc.*, No. 11-4026, 2011 WL 4971453, at *2 (D. Kan. Oct. 18, 2011); *United States ex rel. Stewart* v. *Altech Servs., Inc.*, No. CV-07-0213, 2010 WL 4806829, at *1 (E.D. Wash. Nov. 18, 2010).

C. The Difference Between the Predominant Congressional-Purpose-Driven Approach and the Sixth Circuit's Automatic Dismissal Rule Will Affect Few Cases.

Even if there was a genuine conflict, certiorari would not be warranted because State Farm does not raise an important federal issue. As this Court held in *Rice* v. *Sioux City Memorial Park Cemetery*, an issue must be "beyond the academic or the episodic" to warrant review. 349 U.S. 70, 74 (1955). Only a small percentage of FCA cases involve an alleged seal violation. State Farm submitted an appendix listing 43 cases (plus the five Circuit decisions addressed above) decided in the 29 years since Congress enacted § 3730(b)(2) that "address the requirements of the FCA seal provision." (162a-167a.) Yet, the outcome of only two of those 43 cases turned on whether the district court applied the predominant Congressional-purpose-driven approach or an automatic dismissal rule.

Twenty-two of the cases were dismissed because the relator failed to file under seal or serve the government.[6] Ten of those 22 cases also were dismissed

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[6] *See Foster* v. *Savannah Commc'n*, 140 Fed. App'x 905, 908 (11th Cir. 2005) (relator "did not comply with any of the statutory requirements before filing her *qui tam* action" and claim was barred by statute of limitations); *In re Darvocet*, No. 12-270-DCR, 2015 WL 2451208, at *6 (E.D. Ky. May 21, 2015) ("plaintiff failed to abide by the statutory provisions governing claims brought under the FCA," and claims dismissed on statute of limitations and Rule 9(b) grounds); *Segelstrom* v. *Citibank, N.A.*,

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76 F. Supp. 3d 1, 14 (D.D.C. 2014) ("Plaintiffs did not file their Complaint or Amended Complaint under seal and appear to have served the initial Complaint and Amended Complaint directly on Defendants" and relator may not proceed pro se); *United States ex rel. Surdovel* v. *Digirad Imaging Solutions*, No. 07-0458, 2013 WL 6178987, at *3-6 (E.D. Pa. Nov. 25, 2013) (failure to serve complaint and disclosures were "egregious procedural errors" that "completely frustrated the government's ability to investigate the relator's claims"); *United States ex rel. Gunn* v. *Shelton*, No. 13-163-RGA, 2013 WL 5980633, at *2-3 (D. Del. Nov. 12, 2013) (relator failed to serve complaint and evidentiary disclosures on the government, served the defendant instead, failed to state a claim, and was pro se); *Carter* v. *G & S Food Shop*, No. 13-14017, 2013 WL 6421833, at *3 (E.D. Mich. Oct. 10, 2013) (complaint "was not filed under seal" and failed to state a claim); *Walker*, 2013 WL 4774778, at *1-2 ("complete failure to abide by any of the seal provisions, including failure to serve the government with a copy of the complaint"); *Lariviere* v. *Lariviere*, No. 11-40065-FDS, 2012 WL 1853833, at *1-2 (D. Mass. May 18, 2012) ("Plaintiffs did not file the amended complaint in camera or under seal" and served defendants); *Burke* v. *Westcare Found., Inc.*, No. 11-cv-5078, 2011 U.S. Dist. LEXIS 100668, at *3-4 (N.D. Ill. Sept. 6, 2011) ("Plaintiff has not filed his case under seal and the government has not been afforded the opportunity to review his allegations"); *Carter* v. *Subway Store # 6319*, No. 11-cv-15158, 2012 WL 666838, at *3-4 (E.D. Mich. Feb. 29, 2012) ("Plaintiff failed to comply with the requirement that he first provide the government with a copy of the Complaint and evidence, and then file the Complaint under seal with the Court" and "his allegations fail to state a valid claim"); *Daggett* v. *Neufelder*, No. 11-C-0100, 2011 WL 334531, at *1 (E.D. Wis. Feb. 1, 2011) ("Plaintiff has not filed his complaint under seal and the government has not been afforded an opportunity to review his allegations" and failed to state a claim); *Taitz* v. *Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010) (plaintiff "did not file her complaint under seal" and was pro se); *United States ex rel. Mailly* v. *Healthsouth Holdings, Inc.*, Nos. 07-cv-2981, 09-cv-483, 2010 WL 149830, at *3 (D.N.J. Jan. 15, 2010) ("Relators concede that they did not follow the procedural rules for filing a

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on other grounds.[7] The Courts of Appeals agree that such initial filing violations justify dismissal.

In seven cases, the FCA claims were dismissed on grounds other than an alleged violation of the FCA

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qui tam action" and complaint stated "NOT filed under seal"); *United States ex rel. Fellhoelter* v. *Valley Milk Prods., L.L.C.*, 617 F. Supp. 2d 723, 727-728 (E.D. Tenn. 2008) (relator "immediately served all the defendants with copies of the complaint" and failed to state a claim); *Lady Deborah's, Inc.* v. *VT Griffin Servs., Inc.*, No. 07-cv-079, 2007 WL 4468672, at *4-5 (S.D. Ga. Oct. 26, 2007) ("The complaint was not filed with the Court in camera, and the government did not have an opportunity to intervene in the action."); *United States ex rel. Le Blanc* v. *ITT Indus.*, 492 F. Supp. 2d 303, 304-308 (S.D.N.Y. 2007) (failure to file under seal "frustrated the statutory purpose behind the in camera filing"); *United States ex rel. Anderson* v. *ITT Indus. Corp.*, No. 05-cv-720, 2006 WL 4117030, at *1-2 (E.D. Va. Jan. 11, 2006) (relator failed to serve the government and "forwarded complaint to [defendant] on the day it was filed"); *United States ex rel. Price* v. *McFarland*, No. 04-4058-RDR, 2004 WL 3171649, at *3-4 (D. Kan. Sept. 22, 2004) ("[t]he complaint was not filed under seal" and "[t]he allegations of the complaint are insufficient to state a cause of action under the False Claims Act"); *Burns* v. *Lavender Hill Herb Farm, Inc.*, No. 01-cv-7019, 2002 WL 31513418, at *6-7 (E.D. Pa. Oct. 30, 2002) (relator "did not file his Complaint in camera, instead serving it immediately upon all defendants"); *Hale* v. *Nat'l Ctr. for State Courts*, No. 3:97-cv-802, 1998 U.S. Dist. LEXIS 4858, at *12-13 (E.D. Va. Jan. 30, 1998) (relator "has fulfilled none of those [initial filing] requirements"); *Friedman* v. *F.D.I.C.*, Nos. 96-cv-277, 93-cv-415, 1995 WL 608462, at *2-3 (E.D. La. Oct. 16, 1995) (failure to file under seal or state a claim); *Erickson ex rel. United States* v. *Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 911-912 (E.D. Va. 1989) (relator "fail[ed] to file the complaint in camera and to delay service on the defendant").

[7] *Id.*

seal provision.[8] In most of those cases, the district courts declined to even reach the issue of whether an alleged seal violation warranted dismissal.

Six other cases addressed whether a relator must file an amended complaint under seal.[9] In four of

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[8] *Nasuti* v. *Savage Farms, Inc.*, No. 12-30121-GAO, 2014 U.S. Dist. LEXIS 40939, at *44-45 (D. Mass. Mar. 7, 2014) (relator was pro se); *Gray* v. *United States*, No. 11-cv-02024-WYD-MEH, 2012 WL 4359280, at *5-6 (D. Colo. Sept. 24, 2012) (same); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1226-1228 (D. Wyo. 2006) (public disclosure under § 3730(e)(4)); *Castenson* v. *City of Harcourt*, 86 F. Supp. 2d 866, 877-878 (N.D. Iowa 2000) (summary judgment for defendant on the merits); *United States* v. *Fiske*, 968 F. Supp. 1347, 1349-1352 (E.D. Ark. 1997) (failure to state a claim); *United States ex rel. Milam* v. *Regents of Univ. of Cal.*, 912 F. Supp. 868, 889-890 (D. Md. 1995) (same); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990), *case dismissed*, 755 F. Supp. 1055, 1056 (S.D. Ga. 1990) (failure to satisfy Rule 9(b)).

[9] *United States ex rel. Davis* v. *Prince*, 766 F. Supp. 2d 679, 685 (E.D. Va. 2011) ("SAC substantially similar to original complaint"); *Stewart*, 2010 WL 4806829, at *2 ("§ 3730(b)(2) applies only to the complaint and not to any amended complaint"); *United States ex rel. Branch Consultants, L.L.C.* v. *Allstate Ins. Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009) ("plain language of § 3730(b)(2) refers only to 'the complaint,' not amended or subsequent complaints"); *United States ex rel. Ubl* v. *IIIF Data Solutions*, No. 06-cv-641, 2009 WL 1254704, at *4-5 (E.D. Va. May 5, 2009) (amended complaint added no new claims and finding "persuasive" holdings that there is no "duty to file any amendments under seal"); *Wisz ex rel. United States* v. *C/HCA Dev., Inc.*, 31 F. Supp. 2d 1068, 1069 (N.D. Ill. 1998) ("the statute applies only to 'the complaint' and not to any amended complaint"); *United States ex rel. Mikes* v. *Straus*, 931 F. Supp. 248, 258-260 (S.D.N.Y. 1996) (same).

those cases, the district court held that there was no violation because the procedures in § 3730(b)(2) do not apply to amended complaints.[10] The other two held that there was no violation because the amended complaint was "substantially similar to the original complaint."[11]

That leaves eight remaining cases. Two did not even involve an alleged seal violation.[12] In two others, the courts found that the defendants failed to establish that a seal violation had occurred.[13] In one case, the government filed a notice that one of several relators had violated the seal, and that relator stipulated to his dismissal before the court could decide whether a seal violation had occurred.[14] In another, the court held that the alleged seal violation would

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[10] *Id.*

[11] *Davis*, 766 F. Supp. 2d at 685; *Ubl*, 2009 WL 1254704, at *4.

[12] *United States ex rel. Stevens* v. *State of Vt. Agency of Natural Res.*, 162 F.3d 195, 200 (2d Cir. 1998), *rev'd*, 529 U.S. 765 (2000); *United States ex rel. King* v. *F.E. Moran, Inc.*, No. 00-cv-3877, 2002 WL 2003219, at *12-13 (N.D. Ill. Aug. 29, 2002).

[13] *United States ex rel. Gale* v. *Omnicare, Inc.*, No. 1:10-cv-127, 2013 WL 2476853, at *2-5 (N.D. Ohio June 7, 2013); *United States ex rel. Windsor* v. *DynCorp, Inc.*, 895 F. Supp. 844, 847-848 (E.D. Va. 1995).

[14] *United States ex rel. Kurt* v. *Lakeshore Spine & Pain, P.C.*, No. 11-cv-1051, 2012 U.S. Dist. LEXIS 125350, at *2 (W.D. Mich. Sept. 5, 2012); Stipulation and Order Dismissing Relator Tolga Kurt, M.D., *Kurt*, No. 1:11-cv-1051 (E.D. Mich. Dec. 7, 2012), ECF No. 53.

not warrant dismissal "even if *Summers* were controlling law."[18]

That leaves two of the 43 cases decided over the last 29 years that State Farm cited that could have come out differently. In *United States ex rel. Downy* v. *Corning, Inc.*, 118 F. Supp. 2d 1160, 1162-1164 (D.N.M. 2000), the government obtained six extensions of the seal period over three years and successfully moved to partially lift the seal so that it could disclose the complaint to the defendants. Docket, *Downy*, No. 1:96-cv-00378 (D.N.M. filed Mar. 20, 1996). After the government nevertheless declined to intervene, but before the district court lifted the seal, the relator served the complaint on the defendants. The district court refused to dismiss the case because the government was not harmed. *Downy*, 118 F. Supp. 2d at 1163.

In *United States ex rel. Kusner* v. *Osteopathic Medical Center of Philadelphia*, No. 88-9753, 1996 WL 287259 (E.D. Pa. May 30, 1996), the government declined to intervene and the relator filed a motion to unseal, but the district court never ruled on that motion. *Id.* at *1. Approximately two years later, the relator served the complaint on defendants under the

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[18] *Bibby*, 76 F. Supp. 3d at 1411 (where seal violation occurred after sixty-day statutory period, "it is not clear that the Relators violated the statute, but instead, violated the Court's orders extending the original seal").

mistaken belief that the seal had been lifted, and the district court likewise declined to dismiss because the government was not harmed. *Id.* at *5.

Given that only two of the 43 cases over 29 years that State Farm identified might have come out differently, certiorari is not warranted.

D. The Fifth Circuit's Application of the FCA Seal Provision Is Faithful to this Court's Precedents and the FCA's Text and Purpose.

State Farm also argues that the decision below is inconsistent with this Court's jurisprudence establishing a universal mandatory dismissal rule whenever a procedure in a statute that creates a cause of action has not been satisfied. Pet. at 19-25. This Court never has applied such a rule. Rather, this Court has determined what consequence, if any, to impose based on Congress's intent as expressed in the language, context, history, and purpose of the statute at issue, and that is precisely the approach that the Fifth Circuit embraced by asking whether an alleged seal violation frustrated the purposes of § 3730(b)(2).

In *Dolan* v. *United States*, this Court held that when Congress establishes a procedure without specifying a consequence, courts should look "to statutory language, to the relevant context, and to what they reveal about the purposes that [the procedure] is designed to serve." 560 U.S. 605, 610 (2010). Speaking about timing provisions like the 60-day seal

period in § 3730(b)(2), this Court held in *Barnhart* v. *Peabody Coal Co.* that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 537 U.S. 149, 159 (2003). In *Barnhart*, this Court discussed how some procedural errors justified dismissal and others did not, and it held that "[f]ormalistic rules do not account for the difference, which is explained by contextual and historical indications of what Congress meant to accomplish." *Id.* at 159 n.6.

The Fifth Circuit's approach is founded upon the text, structure, and history of the FCA and § 3730(b)(2), consistent with *Dolan* and *Barnhart*. With respect to the text, "no provision of the False Claims Act explicitly authorizes," much less requires, "dismissal as a sanction for disclosures in violation of the seal requirement." *Lujan*, 67 F.3d at 245; *Smith*, 796 F.3d at 430. The FCA's structure similarly suggests that Congress did not intend mandatory dismissal. "When 'Congress includes particular language in one section of a statute but omits it in another' – let alone in the very next provision – this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[16] Congress mandated dismissal for failure

[16] State Farm gets this rule backwards when it draws inferences from Congress's inclusion of the seal requirement in § 3730, which contains other provisions that require dismissal,

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to comply with other requirements in § 3730. *See, e.g.*, 31 U.S.C. § 3730(e)(1), (e)(2)(A), (e)(3), and (e)(4)(a). Section 3730(b)(2) contains no such dismissal language.

State Farm misinterprets four decisions by this Court as mandating an automatic dismissal rule whenever a procedure in a statute is not followed. *See* Pet. at 19, citing *Mach Mining, LLC* v. *E.E.O.C.*, 135 S. Ct. 1645 (2015); *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20 (1989); *McNeil* v. *United States*, 508 U.S. 106 (1933); and *United States ex rel. Tex. Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914). In each of those cases, as in *Dolan* and *Barnhart*, this Court based its rulings on what Congress intended as derived from the text, structure, and history of the statutes at issue, and not on any automatic rule.

In *Mach Mining*, this Court answered every statutory interpretation question based on its analysis of Congress's intent. The central issue was whether courts may review "whether the EEOC satisfied its

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rather than in § 3731. Pet. at 23. This Court rejected a similarly flawed analysis in *Gonzalez* v. *Thaler*, where it explained that "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle" and that the absence of jurisdictional terms in one provision, and the inclusion of such terms in others, "highlights the absence of clear jurisdictional terms in the former." 132 S. Ct. 641, 651 (2012). Moreover, the dichotomy that State Farm draws between §§ 3730 and 3731 is false, as § 3731 also contains a mix of provisions, some of which, like the statute of limitations in § 3731(b)(1), mandate dismissal.

statutory obligation to attempt conciliation before filing suit." 135 S. Ct. at 1649. This Court answered that question affirmatively by asking whether the "statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id.* at 1651. It held the EEOC must attempt conciliation before filing suit as a "statutory prerequisite" based on the language of the provision: "[o]nly if the Commission is 'unable to secure' an acceptable conciliation agreement . . . may a claim against the employer go forward." *Id.* (quoting 42 U.S.C. § 2000e-5(f)(1)). This Court then defined the bounds of judicial review again based on Congress's intent, "reject[ing] any analogy between the NLRA and Title VII" because Congress had different goals for the two statutes. *Id.* at 1654.

Most significantly, this Court in *Mach Mining* made clear that there is no automatic dismissal rule, even for failure to satisfy a "compulsory prerequisite to suit." It held that if a district court finds that the EEOC did not seek conciliation, the district court should stay – not dismiss – the action so that the EEOC can fulfill Congress's goal before the action proceeds:

> Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. *See* § 2000e-5(f)(1) (authorizing a *stay* of a Title VII action for that purpose).

Id. at 1656 (emphasis added). The Second, Fourth, Fifth, and Ninth Circuits' approach of dismissing cases for alleged seal violations only where Congress's goals for § 3730(b) have been frustrated is in harmony with *Mach Mining*.

In *Hallstrom*, this Court similarly based its decision on Congress's intent by giving effect to the plain language of the Resource Conservation and Recovery Act of 1976 ("RCRA"), which expressly mandated dismissal of actions that did not comply with a 60-day deadline. 493 U.S. at 22, 25-26. The relevant RCRA provision provided:

> (b) ***Actions prohibited.***
>
> *No action may be commenced* under paragraph (a)(1) of this section – (1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator [of the EPA]; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order.

42 U.S.C. § 6972(b)(1) (1982 ed.) (emphasis added). This Court made clear that it based its decision on Congress's intent as expressed in unambiguous statutory text:

> The language of this provision could not be clearer. A citizen may not commence an action under RCRA until 60 days after the citizen has notified the EPA, the State in which the alleged violation occurred, and the

> alleged violator. Actions commenced prior to 60 days after notice are "prohibited."

493 U.S. at 26. The FCA's seal provision, unlike RCRA, does not "authorize[ ] dismissal as a sanction for disclosures in violation of the seal requirement." *Lujan*, 67 F.3d at 245.

In the two other cases that State Farm cites, this Court similarly examined statutory language to determine whether Congress intended noncompliance with a procedure to warrant dismissal. In *McNeil*, this Court again derived Congress's intent from unambiguous text:

> The command that an "*action shall not be instituted* . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied " is unambiguous. We are not free to rewrite the statutory text.

508 U.S. at 111. This Court applied a similar analysis more than a century ago in *McCord*:

> The purpose of Congress to give the United States the exclusive right to bring suit within six months is stated in terms too plain to be mistaken or to require construction. . Whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning.

233 U.S. at 163. Thus, this Court consistently has determined the effect of noncompliance with statutory procedure based on what Congress intended, not

by applying an automatic rule. The Fifth Circuit's decision in this case, and the similar decisions of the Second, Fourth, and Ninth Circuits discussed above, embody just such an approach.

II. The Fifth Circuit's Ruling that the Rigsbys Presented Sufficient Evidence to Prove that State Farm Acted with the Requisite Scienter to Violate the FCA Does Not Warrant Review.

State Farm also asks this Court to review the adequacy of the evidence that State Farm "knowingly" submitted false claims to the government and made false records. Pet. at 28. The FCA defines "knowingly" broadly to "mean that a person, with respect to information – (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). The Fifth Circuit held that the Rigsbys presented sufficient evidence to prove, at a minimum, that Lecky King, the State Farm official in charge of its adjustment of NFIP flood claims, recklessly caused State Farm to submit flood claims and use false documents without knowing whether wind or flood caused the damage at issue. (38a-39a.) This holding is sufficient to impose liability upon State Farm under the plain language of the FCA and the decisions of this Court and every Circuit.

A. The Fifth Circuit Upheld State Farm's Liability Based on Lecky King's Knowledge, Not the Collective Knowledge Doctrine.

State Farm asks this Court to review the Fifth Circuit application of a "collective knowledge doctrine," stating: "the Fifth Circuit allowed liability based upon unspecified collective, amorphous 'knowledge' of State Farm employees who were purportedly 'perpetrators' of a generalized scheme to mischaracterize wind damage as water damage, but had no role in or knowledge of the McIntosh flood claim at the time it was submitted." Pet. at 31-32. The Fifth Circuit applied no such doctrine; rather, it held:

> In this case, there was evidence that adjusters were effectively told to presume flood damage instead of wind damage. There was also evidence that State Farm knowingly violated W5054, concealed evidence of wind damage, and strong-armed an engineering firm to change its reports. Even if we were to agree with State Farm that one individual must have knowledge that a claim is false, the jury could have reasonably believed that King alone, "act[ing] in reckless disregard of the truth or falsity" of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used.

(38a-39a.) "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Accordingly, this case is not an appropriate vehicle to review

whether the collective knowledge doctrine can be applied in FCA cases.

B. The Fifth Circuit's Imposition of FCA Liability on State Farm Based on Lecky King's Knowledge Implicates No Circuit Split.

State Farm likewise is incorrect when it argues that the Fifth Circuit's decision below implicates a split between the D.C. Circuit's decision in *United States* v. *Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) ("*SAIC*"), and the Fourth Circuit's decision in *United States ex rel. Harrison* v. *Westinghouse Savanna River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003). *See* Pet. at 29-30. According to State Farm, *SAIC*, 626 F.3d at 1276, "requires at least one employee have knowledge both of the underlying facts that render a claim or certification false and of the fact that a false certification is being made or a false claim submitted," whereas *Harrison*, 352 F.3d at 919, rejected that requirement. Pet. at 30.

This case does not implicate any such disagreement because the Fifth Circuit expressly found that one employee – King – possessed just such knowledge and "acting in reckless disregard of the truth or falsity of the information . . . caused" State Farm to present a false claim for payment and a false record to the government. (39a.) No court State Farm cites has held that such proof is insufficient.

To bolster its argument of a relevant Circuit split, State Farm suggests that *SAIC* also held that only the knowledge of the employee who submits a claim or certification can satisfy the FCA's knowledge requirement for a company. Pet. at 29. According to State Farm, it is irrelevant whether King and others "intended to engage in a scheme to defraud the government" because they did not "approve the claim at issue and were not shown to have influenced the decision to approve it." *Id.*

As an initial matter, State Farm's assertion that King's actions "were not shown to have influenced the decision to approve" the McIntosh claim is directly contrary to the Fifth Circuit's holding that the evidence established that "King alone, 'acting in reckless disregard of the truth or falsity' of the information, 1) *caused* a false claim to be presented for payment, and 2) *caused* a false record material to a false claim to be made or used." (39a; emphasis added.) State Farm does not ask this Court to review the sufficiency of the evidence to support that finding – it asks this Court to assume that the Fifth Circuit's finding is false. *See* Pet. at i-ii (premising question presented on the assumption that "there was no causal nexus between the submission of the false claim or record and the purported collective knowledge or imputed ill intent of those other employees").

State Farm's argument that only the knowledge of the employee who submits a false claim, record, or certification matters is contrary to a uniform body of federal law. Congress made clear that liability is not

tied to the knowledge of submitters in § 3729(a)(1)(A) and (B) by expanding liability to encompass anyone who "knowingly 'causes to be presented' a false claim" or "knowingly 'cause[s] a false record to be made or used.'" This Court has held that "[a] method that makes uses of innocent individuals or businesses to reach and defraud the United States" is actionable under the FCA. *Tanner* v. *United States*, 483 U.S. 107, 129 (1987). Every other Circuit that has considered an innocent certifier defense has rejected it. *See Grand Union Co.* v. *United States*, 696 F.2d 888, 890 (11th Cir. 1983); *Harrison*, 352 F.3d at 918-919.

Contrary to State Farm's argument, *SAIC* is in accord. The D.C. Circuit held that if any employee "knew or recklessly failed to know that [the company], by having these conflicts [of interest] and failing to disclose them, violated a requirement under its [contract with the government] that was material to the receipt of payment, then that finding would be enough to establish [the company's] scienter." *SAIC*, 626 F.3d at 1276. Moreover, *SAIC* expressly held that a company would be liable if it established procedures that precluded it from knowing whether the claims it submitted to the government were true or false:

> [i]f a plaintiff can prove that a government contractor's structure prevented it from learning facts that made its claims for payment false, then the plaintiff may establish

> that the company acted in deliberate ignorance or reckless disregard of the truth of its claims.

Id. Here, King implemented procedures that prevented State Farm from performing FEMA-mandated line-by-line adjustments to ascertain whether wind or flood actually damaged policyholders' homes, and that finding is sufficient for liability under the decisions of this Court and every Circuit to consider the issue. (38a.)

C. The Fifth Circuit's Evidentiary Ruling that Lecky King Possessed the Requisite Knowledge to Hold State Farm Liable Under the FCA Is Well-Founded and Does Not Warrant Review.

State Farm has not asked this Court to review the evidence that Lecky King recklessly "caused" State Farm to submit a false claim and false record in this case. Pet. at i-ii. Even if it had, that issue does not warrant certiorari. This Court "do[es] not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); Sup. Ct. R. 10. This Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

As set forth in the Counterstatement of the Case at 6-9, King instructed State Farm's adjusters to:

presume flood damage; forgo line-by-line adjustments; manipulate the Xactotal program to "hit the limits" of NFIP flood policies; violate controlling FEMA directive W5054; and manufacture fake line-by-line reports to hide those violations. (4a-5a, 15a-17a, 36a-38a, 40a-41a.) She ensured flood determinations by "strong-arming" the engineering firm that State Farm retained to change its engineering reports, including the report for the example McIntosh home.[17] (6a, 38a-39a.) These facts highlighted by the Fifth Circuit, and many more that the Rigsbys proved at trial, are more than sufficient to prove that Lecky King caused State Farm to reach flood determinations, pay NFIP flood claims, and produce false records, at least recklessly or in deliberate ignorance

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[17] State Farm argues (at 35-36) that the Fifth Circuit was required to ignore that King "strong-armed" Forensic because King did so after State Farm paid the McIntosh NFIP flood claim. As an initial matter, State Farm's payment of flood claims before it received the engineering report supports the finding that State Farm was reckless or deliberately ignorant. The argument also ignores how the NFIP works and the plain language of § 3729(a)(1)(A), which makes liable "any person who – (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment *or approval*." (Emphasis added). Under the NFIP, WYO insurers like State Farm must submit their files to FEMA for approval after claims are paid no less frequently than every three years. 44 C.F.R. Pt. 62, App. B(c)(3)(B) and (C), (d)(3). King's actions to hide the Ford Report, have Ford fired, and coerce Forensic to change reports all occurred before State Farm submitted the McIntosh NFIP file to the government for approval. Finally, even if King's actions had been after-the-fact, they still are relevant to prove her fraudulent intent.

of whether Katrina's wind or flood caused the homeowner's loss.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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